IN THE

# Supreme Court of the United States

October Term, 1966

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MANUEL VACA, CALEB MOONEY, and ERNEST F. KOBETT,
*Petitioners*

v.

NILES SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Manuel Vaca, Caleb Mooney, and Ernest F. Kobett, petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered against them in the above-entitled case on December 13, 1965.

## OPINIONS BELOW

The Circuit Court of Jackson County issued no opinion. Its order (R. 282)[1] is reprinted in Appendix B to this petition. The opinion of the Kansas City Court of Appeals, which is unreported, is set forth in Appendix C to this petition. The opinion of the Supreme Court of Missouri *en banc* is reported at 397 S.W.2d 658. It is set forth in Appendix D to this petition.

## JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 13, 1965. A timely petition for re-

[1] Record references are to the pagination of the record as certified by the Clerk of the Supreme Court of Missouri which has been filed with the Clerk of this Court.

hearing was filed on December 28, 1965 and was denied on January 10, 1966. On April 7, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including May 2, 1966. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

When a union subject to the National Labor Relations Act processed an employee's grievance under a collective bargaining agreement but refused to take it to arbitration because it believed in good faith that it lacked merit:

1. Can the grievant's claim that the union violated its duty of fair representation be adjudicated and remedied in a suit for damages against the union, or does exclusive jurisdiction over such a claim lie with the National Labor Relations Board?
2. If the Board does not have exclusive jurisdiction, does federal law authorize the court or jury to award damages against the union in the absence of any evidence of bad faith or discriminatory motive and solely on the basis of testimony going to the merits of the grievance?
3. Is the proper relief, in such a suit, an award of damages based on the assumption that the grievance would have been sustained if taken to arbitration, or should the court be limited to entering an order requiring the grievance to be arbitrated?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, Section 8, and Article VI of the Constitution of the United States; Sections 7, 8(b), 8(d), 9(a) and 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158, 159 and 160; and Section 301(a) of the Labor-Management Relations Act, 1947,

29 U.S.C. § 185. The pertinent provisions thereof are set forth in full in Appendix A to this petition.

## STATEMENT

### *The Case in a Nutshell*

Ben Owens was a strong man. He used to work long hours in a "cooler" in a Swift and Company packinghouse trimming and manhandling beef carcasses. But he was also a sick man. He had a congenital heart condition and high blood pressure, for which he had been treated for many years.

In May 1959, Ben Owens just couldn't work any more. He took sick leave and went to the hospital. Several months later, his doctor certified that he was able to return to work. But the company doctor told him that he was still too sick to work and should go back to bed.

Ben Owens couldn't take the company doctor's advice. He filed a grievance under the collective bargaining agreement and, while it was pending, he got other jobs requiring heavy work. His union processed his grievance through four steps of the grievance procedure, but decided not to take it to arbitration when an independent heart specialist, after thoroughly examining Owens, concluded that he was too sick to work.

Ben Owens died in December, 1964, at 52. Before he died, however, he had brought this suit against his union in a Missouri court for failing to take his grievance to arbitration. And he had persuaded a jury that he was strong and healthy and should recover $10,000 in damages. The trial court set aside the verdict on the ground that Owens should have taken his claim to the National Labor Relations Board. On the appeal of Owen's administrator, the Supreme Court of Missouri reinstated the verdict, thus raising basic questions as to the nature of a union's obligations under federal law in administering the grievance and arbitration provisions of a collective bargaining agreement, and as to the proper rem-

edy for a claim that a union has failed properly to meet those obligations.

*The Details*

The United Brotherhood of Packinghouse Workers is the collective bargaining representative of the production and maintenance workers employed by Swift and Company at several of the company's plants, including its packing house in Kansas City, Missouri. The local at Kansas City is Local 12. The present suit was filed in the Circuit Court of Jackson County, Missouri by Benjamin Owens, Jr. against the petitioners as representative officers of the union.[2]

The petition for damages, as amended, alleged that under the collective bargaining agreement the union was Owens' agent in matters dealing with his employment by Swift and Company, particularly in connection with the handling of grievances (R. 9). It further alleged that the company had violated the agreement by wrongfully suspending Owens on the false assertion that he was not physically fit to hold his job, and that in fact he was physically able to work. (R. 10). It alleged, finally, that Owens had requested the union to take his grievance to arbitration, and that the union arbitrarily, capriciously and without just or reasonable cause, had refused to do so. It prayed for actual damages in the sum of $7,000 and punitive damages of $3,000. (R. 12)[3].

The defendants' answer raised the following defenses, among others: (1) that jurisdiction over the subject matter of the action was exclusively with the National Labor

[2] At the time suit was filed, Manual Vaca was President of Local 12, Caleb Mooney was Vice President of the local, and Ernest F. Kobett was Vice President of the national union. The complaint drew no distinction between the local and the national union, and all three petitioners were sued as representatives of the national union. (R. 8)

[3] The complaint also alleged (R. 12) that the union wrongfully had demanded approximately $300 from the plaintiff before taking the case to arbitration and refused to arbitrate the grievance because of the plaintiff's refusal to pay such $300. This issue, however, ultimately dropped out of the case. See n. 5a, p. 8, *infra*.

Relations Board, which pre-empted the jurisdiction of the courts (R. 13), (2) that the petition had failed to state a cause of action, and (3) that the defendants had not exercised bad faith in refusing to process the grievance (R. 14).

The case came on for trial in June, 1964. The facts, as they developed at the trial, were substantially undisputed. Owens had worked for Swift and Company as a laborer and as a trimmer since 1946. His job involved the performance of heavy labor and the cutting of meat in a refrigerated room (R. 145-147). He was sometimes required to lift and carry (with a helper) sides of beef weighing as much as 900 pounds each (R. 30-31), and chucks weighing up to 75 pounds (R. 33).

Owens suffered from a congenital heart condition and high blood pressure, and had been under treatment at the Kansas City University Medical Center off and on since 1956 (R. 93, 109). In May, 1959, Owens, in his own words, "was feeling awfully bad" (R. 120), was "exhausted," and "didn't see any sense in going on killing" himself (R. 123). He decided to leave work in order to rest up (R. 28). The collective bargaining agreement provided for sickness and accident benefits on certification by a physician of physical inability to work (Appendix E, p. 54-5), and the company physician, a Dr. Saper, gave Owens permission to take sick leave and draw those benefits (R. 77). His own doctor, a Dr. Alexander, then put him in the hospital, where he remained for a week (R. 79).

At the end of August 1959, Dr. Alexander gave Owens a certificate saying that he was physically able to return to his job (R. 30). But when Owens reported to the plant, Dr. Saper took his blood pressure and refused to allow him to work. Indeed, Dr. Saper advised Owens to get back in bed as fast as he could and to stay there (R. 39, 126). Owens continued to draw sick leave until December 18, 1959. He then went to a Dr. Steinig, who treated him for three weeks and then also gave him a certificate that he was

able to work (R. 47). This time, however, Owens presented his certificate to a company nurse who, unaware of his history, sent him back to work. He worked three days—January 6, 7 and 8, 1960—until the medical department of the company discovered he had come back to work and told his superintendent to send him home. (R. 48-52, Def. Ex. 21, p. 3).

Owens then, in early January, 1960, filed a grievance under the collective bargaining agreement[1]. While the grievance was pending, Owens went to a number of doctors who gave him certificates either showing his blood pressure at the time of the examination or stating that he was able to work (R. 39, 83-88). Owens did not inform any of these doctors that he had a history of heart trouble (R. 263-64).

In the second step of the grievance procedure the union, relying on the certificates of Owens' various doctors, took the position that Owens was able to work, and that in the event he was not able to do his regular job he should be provided with light work. The company said that it had no light work and that, on the basis of its medical records, Owens' return to his regular job would be hazardous to his life. The union appealed the grievance to the third step and then to the fourth step. And Owens hired a lawyer. (R. 110).

In the fourth-step meeting, in which the national union participated, the company took the position that in the face of their own doctor's opinion and the report of Owens' treatment at Kansas City University Hospital going back to 1956, they could not reinstate Owens simply on the basis of certificates that he was able to work or simple blood pressure readings, but would require the report of a complete

[1] The agreement provided a typical five-step grievance procedure, providing for discussions at ascending levels of company and union responsibility and terminating, at the fifth step, with arbitration before a named permanent arbitrator (R. 45-46; Appendix E to this petition, pp. 33-34).

physical examination (R. 235). They then discussed rehabilitation. The company proposed to Owens, who was present, that he seek help from the heart association in learning a new trade involving lighter work (R. 108, 185, 219). The company also promised to help him qualify for social security (R. 190, 219). Owens asked time to think it over and, at the union's request, the grievance was simply "held" at the fourth step (R. 28; Def. Ex. 20).

A few weeks later Owens decided that he was not interested in rehabilitation and refused to go to the heart association. (R. 117). He asked the union to take the case to arbitration. (R. 125). The Executive Board of the Local then met to consider the case and decided to send Owens to any doctor of his own choosing at union expense, to attempt to get some better medical evidence. (R. 191, 219). Owens went to Dr. Hesser—one of the doctors who had given him a certificate—to get, in his words, "a real examination." (R. 83). Dr. Hesser said that, as a surgeon, he was not able to conduct such an examination. He recommended a heart specialist, Dr. Day. (R. 103, 260).

On February 6, 1961, Dr. Day examined Owens and concluded that Owens was a very sick man indeed (R. 143). According to his written report, Owens' blood pressure was 260/120 or higher (this was the upper limit of the doctor's apparatus). His electrocardiogram showed some heart damage. He had moderate kidney damage. In sum, according to Dr. Day, "Owens is not able to work and the legal problems of Workmen's Compensation would prohibit any company from hiring him. I believe he is entitled to social security disability[5] and I would sign such a paper." (Def. Ex. 18).

In light of this report, the local executive board decided

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[5] To qualify for disability benefits under social security, a person must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long continued and indefinite duration." 42 U.S.C. § 423(c)(2).

not to appeal the case to arbitration but to keep it in a "hold" status (R. 194, 221) in the hope that something would develop that would justify a further attempt to get Owens back to work. (R. 252).

In February, 1962, Owens filed this suit. Two years later, on May 8, 1964, the grievance was withdrawn at a meeting with the company at which pending grievances were reviewed. (R. 253).

In addition to testimony as to the above sequence of events, which was substantially undisputed, Owens' attorney sought to shew at the trial that Owens was in fact physically fit. He did this through testimony as to the heavy work Owens had done, on a casual basis, since he left Swift, the baseball games Owens had played, and Owens' own statements as to his physical condition. Some of this testimony was objected to on the ground that the issue to be tried was not whether Owens was in fact physically fit but whether the union had acted in good faith on the basis of the information available to it. The objection was overruled (R. 135-136). The plaintiff did not, nevertheless, introduce any medical testimony as to Owens' physical condition. And the defendants, consistent with their view of the issue to be tried, of course introduced none.[*]

[*] The only other disputed issue related to the claim that defendant Manuel Vaca, the Local Union President, had asked Owens for $300 to arbitrate the case. Owens testified that after the Executive Board had decided not to arbitrate, Vaca told him that if he could pay $300 toward the cost of the arbitration the union might arbitrate. (R. 149-151). Owens also testified that he would not give it to Vaca, but because he trusted Jamerson, the representative who handled the grievance at the second and third steps, he offered it to Jamerson, but Jamerson refused to take it. (R. 257). Vaca denied ever having asked for $300, or any sum. (R. 222). Jamerson, who supported Owens throughout and who had been in favor of arbitrating the case, testified that Owens had volunteered to give him $300 if the case was won but that he refused the offer. (R. 182). The issue was not mentioned in the trial court's summary of the questions to be decided by the jury (R. 265-69) and was not relied on by the Missouri Supreme Court in sustaining the jury's verdict.

The trial court denied defendants' motions for a directed verdict both at the close of plaintiff's testimony (R. 157) and at the close of the entire evidence (R. 265). In both motions the defendants argued, among other things, that there was no evidence that the union's refusal to carry the grievance to arbitration was discriminatory, malicious or in bad faith, and that the subject matter of the action was one within the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act.

The case was submitted to the jury. The court instructed the jury that if the company's claim that the plaintiff was not physically fit was false and its refusal to reinstate Owens was wrongful, and if the union "arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry" the grievance to arbitration, then the jury should find for the plaintiff. (R. 266-269). The jury was further instructed that if it found that the conduct of the defendant was "willful, wanton and malicious" it could award punitive damages against the union. (R. 269). On the other hand, the court instructed the jury that if it found that the union and its representatives acted "reasonably and in good faith," and not "maliciously, arbitrarily, wantonly *or wrongly*," it should find for the defendants. (R. 270, emphasis added).

The jury returned a verdict for Owens in the sum of $10,300: $7,000 for actual damages and $3,300 for punitive damages. (R. 275). The defendants thereupon moved for judgment in accordance with their prior motion for a directed verdict, and in the alternative for a new trial. In addition to the grounds previously urged, the motion complained of the trial court's failure to instruct the jury as to what constituted a wrongful refusal by the union to take the case to arbitration, and the assumption implicit in the court's charge "that the result of an arbitration proceeding would have been the restoration of the job and seniority rights to plaintiff." (R. 278-79). The court sustained the motion

on the ground that the conduct of the defendants was arguably protected under the National Labor Relations Act and that exclusive jurisdiction over the subject matter lay with the National Labor Relations Board. (R. 282; Appendix D hereto).

Owens appealed to the Kansas City Court of Appeals. (R. 282). Prior to argument, he died and his administrator was substituted as the appellant. The Court of Appeals on April 5, 1965, affirmed the judgment of the trial court, with one judge dissenting. (R. 287-297; Appendix C. hereto). On motion for rehearing or transfer to the Supreme Court of Missouri, the Court of Appeals transferred the case to that Court (R. 300).

On December 13, 1965, the Supreme Court of Missouri reversed the Court of Appeals. In its opinion, the court dealt primarily with the issue of federal pre-emption. After reviewing the facts it concluded that its decision must rest primarily upon a correct interpretation of *Machinists v. Gonzales*, 356 U.S. 617, *UAW v. Russell*, 356 U.S. 634, *United Association v. Borden*, 373 U.S. 690 and *Iron Workers v. Perko*, 373 U.S. 701. On the basis of these cases, it concluded that the National Labor Relations Act had not pre-empted the jurisdiction of the Missouri courts.

The court reasoned that the conduct of the defendants was not arguably an unfair labor practice, since there was no showing that the union had discriminated against Owens. The union had nothing to do with Owens being discharged, it said, there was no evidence that it desired that some other member of the union obtain the job from which he had been discharged, nor was there any evidence to indicate that the union's representatives took any action to prevent the re-employment of Owens or to expel or suspend him from union membership. The crux of the plaintiff's claim was that he was wrongfully discharged by the employer, and that the union wrongfully refused to process his claim

to arbitration and thus prevented him from being restored to his job. Since discrimination was neither alleged nor submitted to the jury as an element of the claim, the defendants' action was not arguably an unfair labor practice and the Missouri courts had jurisdiction.

The Supreme Court of Missouri also dealt with the defendants' contention that there was no evidence that the union was guilty of bad faith or discriminatory motive in refusing to prosecute the case to arbitration. Viewing the evidence concerning Owens' physical condition in the light most favorable to appellant, the court said, there was sufficient evidence from which the jury reasonably could have found that the union, as the plaintiff's agent, had arbitrarily and without just cause or excuse refused to carry the grievance to arbitration.

On this basis the court ordered that the cause be remanded with directions to reinstate the verdict for the plaintiff, with only the modification that the award of punitive damages in the amount of $3,300 be reduced to the $3,000 prayed for in the complaint.

## REASONS FOR GRANTING THE WRIT

### I

As this Court has itself explicitly recognized*, there is considerable conflict and confusion over the question of whether the duty imposed on labor unions by the National Labor Relations Act to represent employees fairly is enforceable by private lawsuits in the courts, or by the administrative processes of the National Labor Relations Board. This is a question of utmost importance which is squarely raised in this case, and which should be resolved by this Court.

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* *Humphrey* v. *Moore*, 375 U.S. 335, 344 (1964); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965). See pp. 16-17, *infra*.

The existence of a duty of fair representation, as a matter of federal law, has long been recognized. It was first enunciated in a series of cases arising under the Railway Labor Act, in which this Court held that by empowering unions to act as exclusive bargaining agents for employees, the statute also intended "to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944). See also *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Conley v. Gibson*, 355 U.S. 41 (1957). The same principle has been held applicable in cases arising under the National Labor Relations Act. See, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955), *reversing*, 223 F.2d 739 (5th Cir. 1955); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

Under the Railway Labor Act, the duty of fair representation could only be enforced by the courts, there being no administrative enforcement machinery under that statute. The National Labor Relations Act, however, provides for an administrative agency, the National Labor Relations Board, with exclusive jurisdiction to enforce certain of its provisions. See Sections 8 and 10, 29 U.S.C. §§ 158, 160. Since the duty of fair representation is implicit rather than explicit in the statute, the question of whether that duty is enforceable by the Board or the courts is not answered on the face of the statute.

Until 1962, it had generally been assumed that the duty of fair representation under the National Labor Relations Act, as under the Railway Labor Act, was judicially enforceable. In a number of cases, actions alleging breach of the

duty were entertained in the courts without reference to the possibility that the NLRB might have jurisdiction over such matters. See, *e.g.*, *Trotter v. Amalgamated Ass'n of Street Ry. Employees*, 309 F.2d 584 (6th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962); *Stewart v. Day & Zimmerman, Inc.*, 294 F.2d 7 (5th Cir. 1961); *Ostrofsky v. United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *affirmed*, 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960). Occasionally the issue was raised, but since the Board had never held that it had broad jurisdiction to remedy a violation of the duty of fair representation the courts tended to assume that the matter fell outside the Board's authority. *E.g.*, *Berman v. National Maritime Union*, 166 F. Supp. 327 (S.D.N.Y. 1958). In *Syres v. Oil Workers*, 223 F.2d 739 (5th Cir. 1955), *reversed* 350 U.S. 892 (1955), the issue was raised but the majority held that there was no federal right to fair representation at all under the National Labor Relations Act, and therefore did not reach the pre-emption question. Judge Rives, in dissent, argued that there was such a right but that the Board could provide no remedy. 223 F.2d at 739.

In a series of cases decided since 1962, however, the Board has held that it does have jurisdiction to remedy violations of the duty of fair representation, and that such violations are "unfair labor practices" under Section 8(b) of the Act, 29 U.S.C. § 158(b). The first of these cases was *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied* 326 F.2d 172 (2d Cir. 1963). In that case, the Board held that the right of employees to be fairly represented is one of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157, and that "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" is an unfair labor practice under Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)

(1)(A). The Board specifically relied on *Steele* and the other Railway Labor Act decisions of this Court.[1]

In *Independent Metal Workers Union (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964) the Board held that a union's failure to process an employee's grievance on grounds of race was an unfair labor practice under Sections 8(b)(1)(A), 8(b)(2) and 8(b)(3), 29 U.S.C. §§ 158(b)(1)(A), (2), (3). In that decision, the Board appeared to recognize that its holding would preclude court enforcement of the duty of fair representation:

> "When the Supreme Court enunciated the duty of fair representation in *Steele* and *Tunstall, supra*, which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical to certain unfair labor practice provisions of the National Labor Relations Act are enforcible by the Federal courts, not an administrative agency. . . . After enactment of the Taft-Hartley Act . . . an administrative remedy [for breaches of the duty of fair representation] became available in our view. . . ." 147 N.L.R.B. at 1575.

The Board has applied its rule that breaches of the duty of fair representation constitute unfair labor practices in two

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[1] The Second Circuit reversed the *Miranda* decision, but there was no majority on the question of whether a violation of the duty of fair representation is an unfair labor practice. Judge Medina wrote an opinion holding that the Board's jurisdiction is limited to cases where "the union or the employer . . . have committed some act the natural and foreseeable consequence of which is to be beneficial or detrimental to the union," and that other forms of unfair or discriminatory action by a union are remediable only in the courts. 326 F.2d at 175-180. Judge Lumbard concurred in the result without reaching this question, and Judge Friendly dissented.

subsequent race-discrimination cases. *Local 1367, International Longshoremen's Ass'n*, 148 N.L.R.B. 897 (1964); *Local 12, United Rubber Workers*, 150 N.L.R.B. No. 50, 57 L.R.R.M. 1535 (Dec. 16, 1964). And in *Amberton Knitting Mills, Inc.*, 143 N.L.R.B. 1195, 1216-17 (1963), the Board held that a claim that the union went through a sham arbitration, with no sincere desire to win, would if proved constitute an unfair labor practice since it would also be a violation of the duty of fair representation.

It is, of course, well-established that neither state nor federal courts may adjudicate controversies which are subject to the jurisdiction of the National Labor Relations Board. Indeed, the mere possibility that conduct may be an unfair labor practice is sufficient to bar court jurisdiction: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). In light of the Board decisions cited above, it is plainly "arguable" that the alleged failure of the union in this case to perform its duty of fair representation in the handling of Ben Owens' grievance constituted an unfair labor practice. And it is equally clear that if the union's action in failing to take Owens' case to arbitration was not in fact in violation of the duty of fair representation it constituted protected activity under Section 7 of the Act immune to state restriction or penalty. *Cf. International Union, UAW v. O'Brien*, 339 U.S. 454 (1950).

For these reasons a substantial number of courts, both state and federal, have held in recent years that they are precluded from entertaining actions to remedy violations of the duty. *Knox v. International Union, UAW*, 223 F. Supp. 1009 (E.D. Mich. 1963), *affirmed*, 351 F.2d 72 (6th Cir. 1965); *Stout v. Hod Carriers, Dist. Council*, 226 F. Supp. 673 (1964); *Mendicki v. International Union, UAW*, 61

L.R.R.M. 2142 (D. Kan., Dec. 23, 1965); *Cosmark v. Struthers Wells Corp.*, 412 Pa. 211, 194 A.2d 325 (1963) *cert. denied*, 376 U.S. 962 (1964); *Webster v. Midland Elec. Corp.*, 43 Ill. App.2d 359, 193 N.E.2d 212 (1963), *cert. denied*, 377 U.S. 964 (1964); *Young v. United Steelworkers*, 216 A.2d 500 (Pa., Jan. 17, 1966). Other courts, however, have continued to entertain such suits without discussion of the question of whether the matter was subject to the jurisdiction of the Board. *Green v. Los Angeles Stereotypers Union*, 356 F.2d 473 (9th Cir. 1966); *Hiller v. Liquor Salesmen's Union*, 338 F.2d 778 (2d Cir. 1964); *Freedman v. National Maritime Union*, 347 F.2d 167 (2d Cir. 1965); *Wheatley v. International Brotherhood of Teamsters*, 15 Utah 2d 80, 387 P.2d 555 (1963).

Although the question has been presented, either directly or collaterally, in a number of cases in this Court, it has never been explicitly decided. It first arose in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in the context of a suit to enjoin enforcement of an allegedly discriminatory agreement. The Court noted the question in a footnote, 345 U.S. at 332, n. 4, but said that the agreement being challenged was so clearly within the union's statutory authority that the question need not be decided.

In *Syres v. Oil Workers*, 350 U.S. 892 (1955), the Court reversed *per curiam*, and without discussion of the pre-emption question, dismissal of a suit to enjoin enforcement of a collective bargaining agreement as racially discriminatory.

That *Syres* did not settle the pre-emption question was made clear after the Labor Board in *Miranda*, 140 N.L.R.B. 181 (1962), adopted for the first time the view that breach of the duty of fair representation constituted an unfair labor practice. *In Humphrey v. Moore*, 375 U.S. 335 (1964) suit was brought to set aside a grievance settlement. The suit there, however, was against both the union and the employer. The Court acknowledged that "there are differing views on whether a violation of the duty of fair representa-

tion is an unfair labor practice," but held that the question did not have to be decided because the action was one to enforce a collective bargaining agreement, and under *Smith v. Evening News,* 371 U.S. 195, such actions against an employer under Section 301 of the Act, 29 U.S.C. § 185, are not pre-empted even if the conduct constituting the alleged breach of the agreement might also constitute an unfair labor practice. *Id.* at 344. Mr. Justice Harlan in a separate opinion urged that the question was "a difficult and important one" which should be decided by the court. 375 U.S. at 360.

The question was again adverted to last Term in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965). There the Court held that an employee could not sue an employer directly for an alleged breach of a collective bargaining agreement without first processing his claim through the contractual grievance procedure. In so doing, it noted that if the employee did file a grievance and "if the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the form of redress then available." 379 U.S. at 652.

In this case, unlike *Moore,* the plaintiff did not join the company and did not, therefore, bring his suit as one under § 301 to enforce his rights against it under the agreement. Indeed, he has brought a separate action against the company for breach of the collective bargaining agreement, which is being held in abeyance pending disposition of the present case. *Owens v. Swift & Co.,* No. 631293, Circuit Court of Jackson County, Missouri. And here, unlike *Maddox,* he did ask the union to arbitrate the case and met with a refusal. The "difference . . . as to the form of redress" which the Court noted in *Maddox* but did not decide is therefore squarely presented.

The importance of the question is obvious. A potential claim that a union has violated its duty of fair representation arises whenever a union settles a grievance in a manner

which is contrary to the desires of one or more employees. As matters now stand, the NLRB as well as some courts will exercise jurisdiction over claims of violations of the duty of fair representation, although one or the other plainly lacks jurisdiction. Employees who truly have been treated unfairly should not have to run the risk of losing their rights by selecting the wrong forum. Unions should not have to defend their actions before both the Board and the courts. And the already over-burdened dockets of the NLRB and the courts should not be further strained by duplicative proceedings, or repeated wasteful litigation over a jurisdictional question which must ultimately be resolved by this Court. The decisions, in both the federal and the state courts, are squarely in conflict. The issue should be resolved in this case.

## II

Aside from the jurisdictional issue discussed above, this case presents a fundamental substantive question as to the nature of a union's statutory duty of fair representation under federal law in the area of grievance handling. Assuming that there is court jurisdiction to entertain actions for breach of the duty of fair representation, by what standards should the court determine that a union violated that duty when it failed to process an employee's grievance to arbitration? If, as in this case, the union's action was based on an honest determination that the grievance lacked merit, is the grievant entitled to judicial review of the merits of the grievance, or must he show that the union's action was based on some dishonest, discriminatory, or irrelevant considerations? That question is highlighted in this case by the simultaneous holding of the Supreme Court of Missouri (1) that it had jurisdiction precisely because there was no evidence of union hostility toward or discrimination against Owens and (2) that the evidence as to the merits of the grievance was sufficient to sustain a finding that the union's refusal to take the grievance to arbitration was "arbitrary" and "wrongful."

The importance of this question cannot be overstated. In every industrial plant in which there is a collective bargaining agreement with a grievance and arbitration procedure, the union is required daily to review grievances and determine which it will process and which it will drop. In Owens' case, the union had to decide whether his physical condition warranted the company's decision that he was unable to work, or whether that decision should be challenged through arbitration. There is nothing unusual about this case—it is the kind of problem which comes up again and again in grievance handling. See, *e.g.*, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). In other cases, unions must decide whether an employee has the necessary skills to perform a particular job to which he is seeking a promotion, or whether an employee who has been discharged really did commit an offense warranting discharge.

The screening of grievances by the union is, of course, essential to the proper function of the grievance procedure. "The employer expects and demands that the Union 'screen' grievances, and the Union must do so if it wants the grievance procedure preserved and future grievances fairly considered by the employers." *Ostrofsky v. United Steelworkers*, 171 F. Supp. 782, 793, (D. Md. 1959), *affirmed*, 273 F.2d 614 (4th cir. 1960), *cert. denied*, 363 U.S. 849 (1960). If every grievance were to be taken to arbitration, the entire system of self-government through the grievance procedure would collapse. Grievance procedures typically provide several "steps" prior to arbitration for the precise purpose of facilitating settlement of grievances by the union and the company without involving an outside arbitrator. Where a grievance procedure works properly, only a very small percentage of all grievances filed actually are arbitrated—the others are either granted by the employer, dropped by the union, or compromised in some way.

Yet if the decision in this case is correct, every time a

union drops an employee's grievance the employee may sue the union for breach of the duty of fair representation, alleging that the union's action was "arbitrary" or "without just or reasonable reason or cause," and obtain a review not of the union's good faith or honesty of purpose, but of the merits of the grievance.

Throughout this litigation the union took the position that the merits of the grievance were not in issue, that the sole question was whether the union had acted in good faith without discrimination. The evidence was uncontradicted that it had done so—and the Supreme Court of Missouri so held in denying the pre-emption claim. Yet, over the union's objection, the trial court permitted the plaintiff to try before the jury the question of his physical condition, and allowed the jury to decide, on the basis of that evidence exclusively, whether the union had acted "arbitrarily" and "without just cause or excuse" in refusing to process the grievance. And the Missouri Supreme Court sustained the jury's verdict on the ground that there was evidence indicating that the plaintiff was physically unable to perform his job, even though it acknowledged that "the union had nothing to do with Owens being discharged," "there is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged," and "discrimination was neither alleged nor submitted to the jury as an element of the claim." (R. 312).

It is plain that a union violates its duty of fair representation when it refuses to handle a grievance because the grievant is a member of a racial or religious or political minority, or for some other irrelevant, discriminatory, or corrupt reason. But where there is no evidence of that sort—where, indeed, it is clear that the union's decision was made on the basis of an honest appraisal of the merits of a grievance—most courts have held that the grievant has no cause of action. Thus, in *Donnelly v. United Fruit Co.*, 40 N. J. 61, 190

A.2d 825, 843-44 (1963), the court stated: "The courts cannot concern themselves with the wisdom of the union's action . . . [S]o long as the union in good faith exercised an impartial discretion in reaching its decision that there was good cause for the discharge, judicial intervention is impermissible." In *Cortez v. Ford Motor Co.*, 349 Mich 108, 84 N.W.2d 523, 529 (1957) the court held that a union has "discretion over grievances and interpretations of contract terms . . . subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action, or fraud." In *Brandt v. United States Lines*, 246 F. Supp. 982, 984 (S.D.N.Y. 1964), the court held that "where the Union refuses to prosecute an employee's claim in good faith and on the basis of a thorough investigation . . ., the employee has no cause for complaint . . ." In *Stewart v. Day & Zimmerman, Inc.*, 294 F. 2d 7, 11 (5th Cir. 1961), the court held that in the absence of collusion or fraud "union officials should be given a wide latitude in deciding intra-union disputes and . . . courts should be slow to intervene in them."

This Court has recognized that "a wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). And in *Humphrey v. Moore*, 375 U.S. 335 (1964), the Court reiterated the "good faith and honesty" test and found no violation of the duty of fair representation because "the union took its position honestly, in good faith and without hostility or arbitrary discrimination." 375 U.S. at 342, 350. The decision of the court below in the present case seems to be in square conflict with these decisions.

The present decision seems also to conflict in principle with this Court's decision in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), involving the scope of judicial review of arbitration awards under collective bargaining agreements. In holding that such awards

cannot be set aside so long as they are based on relevant considerations, the court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.* . . ., the arbitrators under these collective bargaining agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements."

These same considerations seem equally applicable to the present problem. Certainly the federal policy favoring the settlement of grievances through the process of voluntary agreement between labor and management is as strong as the policy favoring grievance arbitration, and surely such settlements would be as effectively undermined if courts had the "final say on the merits" of settled grievances as the policy favoring arbitration would be undermined if courts had broad jurisdiction to review the merits of arbitrator's awards. Moreover, just as arbitrators are more qualified than courts to decide the merit of grievances, surely the parties themselves, who are familiar with the demands and practices of the industry, are in a better position than a court or jury to determine such questions as whether a particular employee is or is not physically able to perform a particular job.

If the decision in the present case is permitted to stand, more and more disappointed grievants will seek judicial review of their union's decision not to process their grievances.

Unions, in turn, will become more and more reluctant to withdraw even the most frivolous grievances to avoid the risks and expense of litigation. The effect on collective bargaining, and particularly grievance handling, will be devastating. We urge, therefore, that this Court take the opportunity which is offered by this case to reaffirm that in grievance matters, as in the negotiation of a collective bargaining agreement, unions are entitled as a matter of federal law to exercise wide discretion which is reviewable only where there is, as the Supreme Court of Missouri said there was not in this case, evidence of fraud, collusion, bad faith, or invidious discrimination.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1966.

## APPENDIX A

### Constitutional and Statutory Provisions Involved

Article I, Section 8 of the Constitution provides, in pertinent part:

> "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."

Article VI, Cl. 2, of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding."

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. §157 (1958), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140 (1947), 29 U.S.C. §158 (1958), provides, in pertinent part:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .
>
> * * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a); . . ."

* * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, . . ."

Section 9(a) of the National Labor Relations Act, 61 Stat. 143 (1935), as amended, 29 U.S.C. §159(a) (1958), provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Section 10(a) of the National Labor Relations Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. §160(a) (1958), provides:

"The Board is empowered, as hereinafter provided,

to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character), even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185, provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or wihout regard to the citizenship of the parties."

## APPENDIX B

## IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

No. 641,467

BENJAMIN OWENS, JR.

*Plaintiff,*

v.

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,

*Defendants.*

**Thursday, August 6, 1964**

Now on this day defendants' action for judgment in accordance with their motion for a directed verdict filed at the close of all the evidence is by the Court sustained for the reason stated in paragraph 9 of said motion, to-wit:

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et. seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri."

Now on this day defendants' alternative motion for a new trial is by the Court overruled.

## APPENDIX C

### IN THE KANSAS CITY COURT OF APPEALS APRIL SESSION, 1965.

No. 24,174

BENJAMIN OWENS, JR.,

*Appellant,*

v.

MANUEL VACA, CALEB MOONEY AND ERNEST F. KOBETT, AS OFFICERS OF THE LOCAL AND NATIONAL UNION,

*Respondents.*

**Appeal from Jackson County Circuit Court**

Plaintiff, a discharged employee of Swift & Company, and member of the local and national union, brought a class action against defendants, officers of the local and national union, for actual and punitive damages arising from his alleged wrongful discharge as an employee of Swift, and the failure of the union and its representatives to process his protest through all of the administrative appellate procedures provided for by the Master Employment Agreement. Jury trial resulted in a verdict in plaintiff's favor for $7,000 actual and $3,300 punitive damages. The trial court set aside the verdict, entered judgment for defendants and stated as its reason therefor that jurisdiction over the subject matter had been pre-empted by the federal government. Plaintiff has appealed.

Benjamin Owens, Jr., the plaintiff, in January, 1960, when he was permanently and finally discharged, was 47 years of age and had been employed for approximately 16 years by Swift & Company. His duties included the moving of heavy halves and quarters of beef. Mr. Owens testified that he had a congenital heart murmur and had great difficulty in keeping his blood pressure and weight within safe limits. He said that in May, 1959, he began to "feel bad",

took some time off and visited Dr. Saper, the company physician; that he returned to work in September, 1959, the return being approved by Dr. C. W. Alexander, his family physician. Mr. Owens was a man 5 feet and 8 inches in height and when he quit work in May, 1959, weighed 230 pounds. Dr. Saper refused to authorize or approve his return to work, declaring that he was unable to perform labor because of his high blood pressure and cardiac condition. However, Dr. Bruce P. McDonald, a physician selected by plaintiff, reported his blood pressure as 160 over 96, and expressed the opinion that he could resume work.

Apparently Owens worked for some time after September, 1959, and for three days in January, 1960, when the employer (foreman) "fired him." This firing and all later refusals to re-employ plaintiff were solely on the ground that he was physically unable to work. No other reason is suggested. Thereafter the union paid for an examination of plaintiff by a heart specialist of his own choice, Dr. Hughes W. Day. A letter or report by Dr. Day, dated February 6, 1961, was received in evidence. This report recited that plaintiff's blood pressure was 260 over 120, and was probably higher as 260 was the top register for the apparatus used. Dr. Day expressed the definite opinion that Owens was physically unable to return to work. The report described the patient's condition as serious, but refused to estimate his probable life duration. We were informed that plaintiff died prior to the appellate court argument.

Plaintiff never worked for Swift & Company after January, 1960. He had periods of employment elsewhere, but not regularly. Among others, he worked for Shostak Iron & Metal Co., Inc., Jewish Community Center and Spencer Chemical Company.

Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers in force at the time, entitled "Handling of Grievances" provided for, contemplated and permitted five ad-

ministrative appellate steps described as "grievance procedures". Plaintiff protested his being denied employment, asserted he was physically able to work and enlisted the help of the union in contesting the issue. The five administrative steps may be briefly described as follows:

*First step:* Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department.

*Second step:* May present the grievance to the Division Superintendent.

*Third step:* It may be presented to a grievance committee composed of three union and three company representatives.

*Fourth step*: Reference may be made to the general superintendent of the company.

*Fifth step*: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement.

It is conceded that plaintiff and the union processed plaintiff's grievance, without success, through the first four steps, but not the fifth step. Plaintiff says the defendants arbitrarily refused and failed to appeal his matter through the fifth step and caused him to lose wages, seniority, and to incur other damages. He charges, too, that one defendant proposed that plaintiff pay him $300 as expense money preliminary to undertaking the fifth step.

Counsel for plaintiff presented a letter, responsive to his inquiry, from an attorney for the National Labor Relations Board. We quote from it:

"The fact that an employee has been terminated from his employment may be a violation of the laws we administer, if it can be shown that the employer discriminated against this employee in regard to hire or tenure of employment, * * *,

"In addition, *if it can be shown that a labor organi-*

*zation caused, or attempted to cause, an employer to discriminate against an employee* in violation of Section 8 (a)(3) for some reason other than the employee's refusal to tender periodic dues and initiation fees, *then this would be a separate violation* * * *". (Italics ours).

As heretofore stated, the jury returned a verdict for plaintiff in the amount of $7,000 actual and $3,300 punitive damages. In response to defendants' after-trial motion, the court set aside the verdict and entered judgment for the defendants for the following stated reason.

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri".

On appeal plaintiff's only assignment of error is the action of the trial court in setting aside the verdict and entering judgment for defendants. On appeal defendants assert, primarily, that the court was right in entering judgment for defendants and for the assigned reason. Defendants assert, secondarily, that such result was proper for two additional reasons: First, under the evidence plaintiff "failed to show that defendant union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim". Second, plaintiff filed this suit before the fourth step had been completed and therefore brought it before exhausting his administrative remedies, hence the suit must fail.

We believe the opinion in Lester Webster et al. v. Midland Electric Coal Corporation et al. (Ill., Oct. 1963) 193 N.E.2d 212, rules the vital issue involved in our case. Its stature is enhanced by the fact that certiorari was denied (June 8, 1964, 84 S.Ct. 1645) by the Supreme Court of the United States. We shall discuss that opinion.

In the Webster case the suit was by 12 employees of Midland Electric. The petition alleged that the company discharged them in violation of the National Bituminous Coal Wage Agreement. Plaintiffs further asserted that the Union defendants refused to take the necessary steps to redress their grievances and asked that they be required to ta' such steps and respond in damages, both actual and punitive. This complaint was dismissed and plaintiffs then filed a class action for declaratory judgment. Again the company was charged with violating the National Agreement and the defendant Union with failure to process their grievances, which failure the complaint alleged was done willfully, wantonly, maliciously and arbitrarily. Again the prayer was for both actual and punitive damages. The circuit court dismissed the action and the plaintiffs appealed. The appellate court affirmed the orders and judgment of the trial court and said, l. c. 217, 218:

> "Plaintiffs' only complaint against the union defendants is that they have refused to process their complaints against Midland. This the union may ordinarily do. (Ostrofsky v. United Steelworkers of America, D.C., 171 F.Supp. 782). Considering the vast number of members of this union, wide discretion must necessarily be placed in the union agents so that as a whole the membership may be best served. (Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681,).
>
> * * *
>
> "In addition, with reference to the union defendants, very recent expressions of the Supreme Court of the

United States hold that the National Labor Relations Board's jurisdiction in matters involving *individual members employment*, pre-empts court jurisdiction. (Local 100 of United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 and Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko, 373 U.S. 701, 83 S.Ct. 1429).

"In the Borden and Perko cases the Supreme Court points out their distinction from the case of International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923. The court said that the Gonzales case applies to strictly internal affairs of a union not involving employment." The Gonzales case is one of those relied upon by appellants in our case.

In Local 100 of the United Association of Journeymen and Apprentices v. H. N. Borden, 373 U.S. 690, 83 S.Ct. 1423, the action was by a union member against the local and parent unions for wrongful refusal of referral of the member on a construction job. The United States Supreme Court, with Douglas and Clark dissenting, held that the local union's conduct in refusing to refer a union member to a particular job was arguably subject to jurisdiction of the National Labor Relations Board, and the state court did not have jurisdiction of the suit by the union member against the local and international unions for damages.

In Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko, 373 U.S. 701, 83 S.Ct. 1429, a union member brought suit in an Ohio state court against the local union and certain of its officers for damages under the state common law because of defendant's causing the member to be discharged, and preventing his subsequent employment as foreman and superintendent. Judgment for the member was affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. On certiorari the Supreme Court of the United States, Mr.

Justice Harlan, held that it was at least arguable that the union member was an "employee" within the National Labor Relations Act and that the National Labor Relations Board might well find that the act charged in the complaint was an unfair labor practice by the Union and hence that there was sufficient probability of cognizability by the Board to require the relinquishment of the state's jurisdiction. The judgment for the union member was reversed outright. Again Justices Douglas and Clark dissented.

In the Gonzales case, 78 S.Ct. 923, 925, 926 (1957) Mr. Justice Frankfurter, speaking for the Supreme Court, affirmed the state court judgment for a union member suing for a wrongful expulsion from the union. The court said:

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied".

Chief Justice Warren and Mr. Justice Clark dissented, and in their dissenting opinion said:

> "By sustaining a state-court damage award against a labor organization for conduct that was subject to an unfair labor practice proceeding under the Federal Act, this Court sanctions a duplication and conflict of remedies to which I cannot assent".

This court, and the writer of this opinion, in United Brick & Tile Division of American-Marietta Co. v. Wilkinson, et al., 325 S.W. 2d 50, 54, 55, reluctantly concluded there was pre-emption in that case and said:

> "In the Weber case (75 S.Ct. at page 488) Mr. Justice Frankfurter made this statement: '* * * the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvi-

ous conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters (etc.) Union, supra. But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much" ' ".

That the question—"Has the Federal Government pre-empted?" under various sets of facts, presents knotty questions and has produced vague answers and different conclusions is further evidenced by the dissents of the two justices in the Borden and Perko cases, supra.

We have read the cases cited by appellant and while many of them bear on the issue and some might seem to guide us to a different conclusion, we cannot allow the reasoning in those cases to prevail over the very recent and quite pertinent pronouncements by the Supreme Court of the United States. We believe that the conclusions expressed by the Supreme Court in the Borden and Perko cases and that court's refusal to grant certiorari in the Illinois case (Webster v. Midland, supra), are decisive on the matter before us. In our opinion those are the last and clearest (even though not unanimous) expressions of our highest court. We therefore hold that the trial court correctly ruled that jurisdiction over the subject matter of this action has been pre-empted by the United States.

The judgment is affirmed.

FRED H. MAUGHMER, C.

SPERRY, C., concurs.

PER CURIAM:

The foregoing opinion of Maughmer, C., is adopted as the opinion of the Court.

CROSS, P. J., concurs.
HUNTER, J., concurs.
HOWARD, J., dissents.

## DISSENTING OPINION

I am unable to agree with the result reached in the majority opinion. Assuming the Union officials acted in bad faith, in failing to carry plaintiff's grievance to the fifth step of the grievance procedure, i.e. arbitration, I can not imagine an argument which would show that these facts constituted discrimination by the employer or an unfair labor practice by the Union. Therefore, I can not conclude that the actions herein complained of are either protected or prohibited by Sections 7 or 8 of the National Labor Relations Act (29 U.S.C. Section 157,158). This view is bolstered by the decisions in the cases of Humphrey v. Moore, 375 U.S. 355, 84 Sup. Ct. 363, Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 Sup. Ct. 401, Bailer v. Local 470, International Teamsters, Chauffeurs, Warehousemen and Helpers, 400 Pa. 188, 161 A. 2d 343, and United Steelworkers of America v. Westinghouse Electric Corporation, 413 Pa. 358, 196 A. 2d 857.

While this matter of federal preemption in the field of labor relations remains cloudy, I do not believe that a state court should deny its own jurisdiction where it is unable to point out a logical argument showing that the fact situation is "arguably" within the jurisdiction of the National Labor Relations Board as constituting activity which is protected or prohibited by Sections 7 and 8 of the Act.

For these reasons, I would assert jurisdiction in the state court and reverse the judgment below.

FRED L. HOWARD, *Judge*

## APPENDIX D

## IN THE SUPREME COURT OF MISSOURI
## EN BANC
## SEPTEMBER SESSION, 1965

**No. 51,554**

NILES SIPES, ADMINISTRATOR OF ESTATE OF BENJAMIN OWENS, JR., DECEASED,

*Appellant,*

v.

MANUEL VACA, ET. AL.,

*Respondents.*

**Appeal from the Circuit Court of Jackson County**
**The Honorable J. Donald Murphy, Judge**

This action was instituted by Benjamin Owens, Jr., a discharged employee of Swift & Company and a member of the union, as a class action against the membership of the national and local union of the National Brotherhood of Packing House Workers. Certain officers of said unions were individually named as defendants representative of the class. Owens sought to recover actual and punitive damages resulting from his alleged wrongful discharge and the failure of the union to process his protest through all of the administrative appellate procedures provided for in the Master Agreement. The trial resulted in a verdict for plaintiff in the amount of $7,000 actual and $3,300 punitive damages. Upon motion of defendants the trial court set aside the judgment and entered judgment for defendants for the reason that jurisdiction of the subject matter had been preempted by the federal government. Plaintiff appealed to the Kansas City Court of Appeals. He died while the appeal was pending and his administrator was substituted as appellant.

The Kansas City Court of Appeals adopted an opinion affirming the judgment but one of the judges dissented and

the court of its own motion transferred the case here. In that situation we will decide the case "the same as on original appeal." Article V, § 10, Constitution of Missouri 1945, V.A.M.S.

We will continue, for convenience, to hereinafter refer to Benjamin Owens, Jr., as plaintiff. Plaintiff testified that in January 1960, when he was finally discharged by Swift & Company, he was forty-seven years old and had worked sixteen years for Swift; that part of his work was trimming loins, but he also handled heavy halves and quarters of beef; that he had a congenital heart murmur, was troubled with high blood pressure, and had become overweight; that all of his family had had these complaints and had worked hard and lived to a ripe old age; that in May 1959, he had been working long hours, felt bad, and decided to take sick leave for a time and rest up; that at that time he weighed 230 pounds and upon the advice of his physician began to lose weight; that in August his physician, Dr. Alexander, gave him a statement to the effect that he could go back to work and he attempted to do so. However, Dr. Saper, the company's physician, refused to authorize his return to work because of his blood pressure and cardiac condition. In January 1960, plaintiff was examined by Dr. Steinzeig who gave him a statement that he was able to go back to work. He presented this to the company nurse and she authorized his return to work and he worked three days. On the third day, the superintendent apparently learned that plaintiff was back at work and immediately discharged him on the ground that he was not able to work. Plaintiff testified that at that time he felt fine, had reduced his weight to 180 pounds, and was doing the work assigned to him. Plaintiff further testified that during the period from May 1959 to trial time (June, 1964) he had worked on various temporary jobs but could not get regular employment because he did not dare give Swift, his previous employer, as a reference; that he did hard physical labor for Spencer

Chemical Company, Shostak Iron and Metal Company, Guy Campbell, a contractor, Jewish Community Center, and also did such work as cutting grass, trimming trees and things of that nature; that he was able to earn about $1,000 a year at that type of seasonal employment.

After being discharged, plaintiff protested his being denied employment, asserted he was physically able to work, and sought the help of the union in contesting the issue and presenting his grievance. Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers provided for five administrative appellate steps for handling grievance procedures. The five administrative steps may be briefly described as follows: First step: Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department. Second step: May present the grievance to the division superintendent. Third step: It may be presented to a grievance committee composed of three union and three company representatives. Fourth step: Reference may be made to the general superintendent of the company with a representative of the national union present. Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement. It is conceded that the union processed plaintiff's grievance, without success, throughout the first four steps. Plaintiff cooperated by furnishing the union the statements of a number of physicians indicating that he was able to resume work. Dr. H. H. Hesser, on March 24, 1960, certified that he had taken plaintiff's blood pressure and that the reading was 160.

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Dr. Bruce P. McDonald on May 18, 1960, signed the following certificate: "This is to verify Mr. Owens was examined and treated by me this date and that he is released to resume his regular work as of May 23, 1960." On July 6, 1960, Dr. John M. Gill signed a statement to the effect that he

had taken plaintiff's blood pressure that day and the reading was 160. On July 8, 1960, Dr. C. W. Alexander signed the
100
following statement: "This is to certify that Benjamin Owens has been examined by me. His blood pressure is 160. It is my opinion he is physically able to perform regu-
100
lar work." The company in denying plaintiff's reinstatement did not question the qualifications or integrity of any of plaintiff's physicians but contended that it should have a report indicating a more detailed examination. The company also claimed to have a report from Dr. Saper and Dr. Morris which indicated that plaintiff was not physically able to resume his employment. After the close of the hearing on the fourth step, the union and the company agreed that the grievance be held open at that stage pending further developments and the possible obtention of additional evidence. The union representatives suggested that he have a complete examination by a doctor of his choice and the union would pay for the examination. Plaintiff went to Dr. Hesser who sent him to Dr. H. W. Day, after examining plaintiff, Dr. Day sent a report to the union indicating the plaintiff's blood pressure was 260 and that there was some
120
kidney damage and slight heart damage. He expressed the opinion that plaintiff was not able to work.

Plaintiff testified that he asked Manuel Vaca, president of the local, to carry his grievance to the fifth step but that Vaca stated the union did no have the money to use for that purpose and that he would take it to the fifth step if plaintiff would give him $300, which, plaintiff stated, he refused to do. There is evidence that the executive committee of the local union thereafter decided not to take plaintiff's grievance to the fifth step because there was not sufficient favorable medical evidence. At about that time plaintiff employed an attorney who wrote several letters to Ernest

Kobett, vice-president of the National Brotherhood, making inquiry as to what future action was contemplated by the union concerning plaintiff's grievance and Kobett did not answer those letters. This suit was filed by plaintiff against representatives of the union on February 13, 1962.

Defendant's evidence consisted of the testimony of four union officers and representatives. They testified as to the handling of plaintiff's grievance through the first four steps, without success, and as to their reason for refusing to take the fifth step. Manuel Vaca denied that he made any request of plaintiff for $300, or any other amount, and said that it would have been outrageous for an officer of the union to make such a request. Mr. Kobett testified that he attended the fourth step meeting and that, on May 8, 1964, he attended another meeting at which plaintiff's case was called up for review and since there was no new evidence to present he withdrew the grievance. He also stated that the president and general counsel of the National Union had advised him to withdraw the grievance. He further testified that out of 967 grievances filed during the two-year period preceding August 1963, only one had gone to the fifth step. He admitted that he did not obtain plaintiff's consent to withdraw the grievance, nor did he notify plaintiff that such had been done. In regard to the practice of handling grievances for members, he stated that: "* * * the employee who is a member of the union submits his case to be handled by the union officers. When he gives them that case it is theirs to dispose of as long as they go through the steps up to a point where we either feel we have a good case or we don't have a case. Then the union makes the decision * * *."

Plaintiff at trial time testified that he was feeling good and had been working whenever he could get work; that he had worked for Spencer Chemical Company until two weeks before trial, handling bags of fertilizer weighing 80 pounds for as much as twelve hours a day; that he had been laid off because of lack of work.

As we have indicated, the trial court sustained the defendants' motion for judgment for the reason that "under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri." Upon this appeal the sole contention briefed by appellant is that the trial court erred in setting aside the verdict and entering judgment for the defendants.

The question presented is not an easy one to decide. The difficulties encountered were recognized in the case of Weber v. Anheuser-Busch, 348 U.S. 468, 480-481, 75 S.Ct. 480, 99 L.ed. 546, wherein the court stated: "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters, C. & H. Local Union [346 U.S. 485, 74 S.Ct. 161, 98 L.ed. 228], supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U.S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation * * *." We have considered many cases cited in the briefs but have concluded that our decision must rest, pri-

marily, upon a correct interpretation of four cases decided by the Supreme Court of the United States. The two cases supporting the view that the state court had jurisdiction are International Association of Machinists et al. v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L ed. 2d 1018, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) et al. v. Russell, 356 U.S. 634, 78 S.Ct. 932, 2 L ed. 2d 1030. Two cases which tend to support a contrary view are Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L ed. 2d 638, and Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko, 373 U.S. 701, 83 S.Ct. 1429, 10 L ed. 2d 646.

In Gonzales, the plaintiff, claiming to have been wrongfulled expelled from membership, brought suit against the union and obtained a judgment ordering reinstatement and awarding him damages for loss of wages as well as for physical and mental suffering. The Supreme Court held that § 158 of 29 U.S.C.A. did not exclude the exercise of jurisdiction by the state court. In so ruling the court stated that: "* * * the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. * * * The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered." 356 U.S. 620, 621.

In Russell, the plaintiff, a nonunion employee, brought a

common-law tort action in a state court against a labor union and recovered a judgment for compensatory and punitive damages for malicious interference with his occupation by mass picketing and threats of violence during a strike. Upon review by certiorari the Supreme Court held that Congress had not deprived the victim of tortious conduct of the type there involved of his right of action for all damages suffered. In its opinion the court said: "We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here. Of course, Russell could not collect duplicate compensation for lost pay from the state courts and the Board.

"Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. *Penney* v. *Warren*, 217 Ala. 120, 115 So. 16. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 10-12. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board * * *." 356 U. S. 646.

In Borden, as stated in the syllabus, "Respondent, a member of a local plumbers' union in Shreveport, La., arrived in Dallas, Tex., looking for a job with a construction company on a particular bank construction project there. Although the foreman of the construction company wanted him, he was unable to get the job, because the company's hiring was done through union referral, and the business agent of petitioner, the local plumbers' union in Dallas, refused to refer respondent. Respondent sued petitioner in a Texas State Court, seeking damages for such refusal and alleging that petitioner's actions constitute a willful, malicious and discriminatory interference with his right to contract and to pursue a lawful occupation; that petitioner had

breached a promise, implicit in the union membership arrangement, not to discriminate unfairly or to deny any member the right to work; and that it had violated certain state statutes. Petitioner challenged the State Court's jurisdiction." 373 U.S. 690, 691. The court held that the conduct of the union was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act and hence the state court was precluded from exercising jurisdiction. The court said the case was to be distinguished from Gonzales in that Gonzales "* * * turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied. * * *. The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages." 373 U.S. 697.

The Perko case involved a plaintiff who was a member of the union. He sued the union and certain of its officers to recover damages resulting from the acts of defendants in demanding that he be discharged from his duties as a superintendent or foreman. He was discharged and alleged that defendants prevented him from obtaining work as a foreman by representing that his foreman's rights had been suspended. Plaintiff obtained a substantial judgment in the state court and the Supreme Court granted certiorari. In holding that the state court had no jurisdiction the court stated that "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to in-

ternal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' *Supra*, p. 703. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." 373 U.S. 705.

A state court case supporting appellant's contention is Bailer v. Local 470, International Teamsters, etc., 400 Pa. 188, 161 A. 2d 348, 346. Therein the following appears: "Appellant avers in his first claim that the appellee Local breached its fiduciary duty to him in not representing him in good faith before the arbitrator. Our jurisdiction over this claim is clearly not ousted by the Taft-Hartley Act, since appellant is suing solely to enforce his rights as a union member and not to enforce rights of employment * * *." On the other hand, a state court case tending to support the position of defendants is Webster v. Midland Electric Coal Corp., 43 Ill. App. 2d 359, 193 N.E. 2d 2[illegible]2[7].

Upon casual consideration it may appear that Borden and Perko conflict with Gonzales. However, it certainly must be said that those cases do not overrule Gonzales, by implication or otherwise, because both of them refer to and distinguish that case. We think it is clear that Borden and Perko are distinguishable, upon the facts, from the case before us. In Borden the union agent willfully refused to let Borden work even though the prospective employer requested that he be referred for a job. Perko lost his job as a foreman because of a dispute with the union as a result of which the union informed Perko's employer that the men would no longer take orders from him.

If, by subsequent opinions, the court has restricted Gonzales and Russell to the precise factual situations there involved (expulsion from the union and interference with employment by mass picketing and threats), then those cases would not apply in a determination of the case at bar. However, our reading of the various cases does not convince

us that such a restricted application of those cases is warranted.

We have concluded that the "Labor Management Relations Act," 29 U.S.C.A., §§ 157 and 158, has not preempted the jurisdiction of the Missouri courts in the case before us. While we think the facts in this case more strongly support state jurisdiction than the facts in Gonzales, we nevertheless are of the opinion that the Gonzales case is decisive of the issue before us.

We do not think that it could reasonably be argued that the conduct of defendants constituted an unfair labor practice in violation of § 158, supra. Defendants contend that such was an unfair labor practice in that it violated § 158(b) and (b)(2) which read, in part, as follows: "It shall be an unfair labor practice for a labor organization or its agents— * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section * * *." Sections (a) and (a)(3) referred to in the foregoing provide that: "(a) It shall be an unfair labor practice for an employer— * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." It appears obvious to us that those provisions do not apply to the factual situation before us. Here the union had nothing to do with Owens being discharged. It is evident that the idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. The crux of plaintiff's claim was that he was wrongfully discharged by his employer and defendants wrongfully failed and refused to process his claim for reinstatement through the "fifth step" and

thus he was prevented from being restored to his job. Discrimination was neither alleged nor submitted to the jury as an element of the claim.

Some of the cases have said that Gonzales involved an internal union matter not directly concerning a matter of employment. Such statements may be technically correct but as a practical matter the real complaint of Gonzales was his inability to obtain employment because of his expulsion from union membership. We see no difference in that situation and the situation in the instant case. We are dealing with an internal union matter in that Owens complained of the refusal of the union to fully process his grievance. He, like Gonzales, hoped that as a result of proper union action he would be restored to his employment. If Gonzales involved a purely internal union matter then the case at bar involves a purely internal union matter. The Gonzales case is clearly applicable here and is ample authority for our conclusion that jurisdiction of the subject matter of this case has not been pre-empted by the Labor Management Relations Act, 29 U.S.C.A., §§ 141, et seq.

Defendants have briefed two alternative contentions which they say support the action of the trial court in entering judgment for them even though we should hold (as we have) that jurisdiction of the subject matter of this claim was not pre-empted by the Labor Management Relations Act, supra. The first of those contentions is: "* * * that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim." In considering that point we will view the evidence in the light most favorable to appellant. The essential issue submitted to the jury was whether the union, as plaintiff's agent: "* * * arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if

It will be noted that the amount of punitive damages specified in the verdict was $3,300. Reference to the petition discloses that the prayer for punitive damages was in the amount of $3,000. Before the judgment is re-entered, as hereinafter directed, plaintiff should be required to file a remittitur in the amount of $300.

The judgment is reversed and cause remanded with directions to reinstate the verdict and judgment for plaintiff.

LAWRENCE HOLMAN, *Judge*

All concur

with the designated committee appointed by the Company, not to exceed three (3) in number, including the plant superintendent or his representative, for the purpose of settling the grievance. The position taken by the Company in this step shall be presented to the Union in writing within five (5) days from the presenting of the grievance in this third step.

*Fourth Step*

If not settled in the third step, then either party may refer the grievance to the General Superintendent of the Company or his designated representative or representatives and to the national representatives of the Union to assist in settlement of the grievance. Upon request of the National Union the Company will hold the fourth step grievance meeting in the city of the plant involved. Within 10 days after receipt of a written request from the National Union for a Fourth Step grievance meeting, the parties will set a mutually satisfactory date for the holding of such a meeting.

*Fifth Step*

If not settled in the fourth step, then the National Union may refer the grievance to Gabriel N. Alexander as Arbitrator, whose decision shall be final and binding upon the parties. In making said decisions, the Arbitrator shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involved in the grievance.

* * *

## SECTION XIV
## SAFETY, HEALTH AND WORKING CONDITIONS

* * *

*Sickness and Accident*

6. (a) (1) When employes are absent from work because of disability due to sickness or noncompensable accident, and when such absences and their continuation are sup-

ported by acceptable medical evidence, part wage payments shall be made in accordance with the terms and conditions hereinafter set forth. The Company agrees that if there is an apparent conflict between the employe's physician and the Company as to the physical ability of the employe to perform whatever work the Company might have available for the employe, the physician employed by the Company will communicate with the employe's physician for the purpose of resolving the conflict.

(2) All absences shall be considered as starting with the loss of the first full day on which the employe was scheduled to work, provided that where an employe, because of disability due to sickness or noncompensable accident, is obliged to leave work before he has completed four (4) hours of his scheduled work day, his absence shall be considered as starting with that day.

*Service Requirements*

(b) (1) Subject to the provisions of the following Subparagraph (b) (2), an employe will qualify for payments under this Paragraph 6 if, at the onset of his disability:

a. The Company's employment records show that he has one (1) year's accumulated or one (1) year's continuous service; and

b. He is accumulating service as defined in Paragraph 11, of this Section XIV.

* * *

*Amount of Payment*

(d) The amount of payment shall be a percentage of wages computed in accordance with the following schedule and on the basis of a forty (40) hour work week at the employe's regular rate of pay or, in the case of employes who have a basic work week either greater or less than forty (40) hours, the percentage of wages computed on the basis of such basic work week at the employe's regular rate of pay:

50% for the first week of disability compensable under this Paragraph 6

55% for second consecutive week of disability compensable under this Paragraph 6

60% for third and fourth consecutive weeks of disability compensable under this Paragraph 6

65% for the fifth and subsequent consecutive weeks of disability compensable under this Paragraph 6.

For absences less than a full work week, daily payments for each day of absence that falls within the employe's weekly guarantee period shall be one-fifth (1/5) of the weekly payment computed as per the above schedule. No payment shall be made for absence on the employe's sixth or seventh scheduled work day in such week.

*Extent of Payments*

(c) The greater of either of the following for any one absence reduced by the payments made for other absences during the twelve (12) months immdiately preceding the onset of the current absence:

1. Two (2) weeks at wages figured in accordance with the preceding paragraph for each year of accumulated service or of continuous service, whichever is the more favorable to the employe, or

2. Thirteen (13) weeks at wages figured in accordance with the preceding paragraph.

* * *

CARD 6

so[] refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respects * * *."

We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants.

The other alternative contention is that the judgment for defendants should be affirmed because "* * * it was shown that the fourth step of the grievance was held open and not completed until almost the time of the trial of this cause of action and after the filing of the same and that, as a consequence thereof, the plaintiff has failed to exhaust his administrative and constructual remedies." That point is without merit. Defendants' evidence showed that they were in complete control of the management of plaintiff's grievance. One of the defendants failed to answer several letters he received from plaintiff's attorney inquiring as to what future action was contemplated concerning the grievance. Finally, without plaintiff's consent, the defendants withdrew it. If plaintiff failed to exhaust his administrative remedies it was entirely the fault of defendants. It is elementary that defendants will not be heard to interpose as a defense to this claim a condition which resulted solely from their action or

## APPENDIX B

*Excerpts from Agreement Between Swift & Company and National Brotherhood of Packinghouse Workers Covering the Period September 1, 1959 to September 1, 1961:*

### PREAMBLE

This agreement is made between Swift & Company (hereinafter called the Company) and the National Brotherhood of Packinghouse Workers on behalf of itself and the Local Unions set forth in Section II (hereinafter, unless otherwise indicated, the word "Union" refers to both National Brotherhood of Packinghouse Workers and the Local Unions).

* * *

### SECTION IX
### PROMOTIONS AND DEMOTIONS

* * *

*Physical Disability*

(2) If an employe who, in the opinion of the Company, is physically unable to perform his regular assignment or his regular assignments desires to be assigned to a job in his own department paying the same or a lower rate than the rate of his own regular assignment or assignments, he may file with the foreman of the department a written request that he be assigned to such job. Such request shall be on the form set forth in Exhibit IV attached hereto and made a part hereof. When such job becomes open or vacant for promotion purposes, such employe shall be assigned to that job, provided, he has more department seniority either than the employe to whom the job would normally be given under the provisions of Subparagraph (a) above or than any other employe who has requested assignment to such job under this Subparagraph (b) (2), and further provided that in the opinion of the Company he can perform such job.

* * *

## SECTION XIII
## HANDLING OF GRIEVANCES

2. Should differences arise between the Company and the Union or between the Company and employes or between employes of the Company, or should any local trouble of any kind arise in the plant, pertaining to matters involved in this agreement or incident to the employment relation, such differences will be handled through the grievance procedure in the following manner and order; and it is the declared policy of the parties hereto that all such matters shall be settled as promptly as possible.

*First Step*

Either:

a. The aggrieved employe may present his grievance with or without the Union representative to the foreman of the department, or

b. In cases where the Union is the aggrieved or the employe refuses to present his grievance, the employe Union representative or representatives (not exceeding three (3), with or without the aggrieved, may present the grievance to the foreman of the department involved.

*Second Step*

If not settled in the first step, then the aggrieved, with or without not to exceed two (2) Union representatives, one (1) of whom shall be an employe of the Company, may present the grievance to the division superintendent or general foreman, whichever is selected by the Company. All grievances presented in this step shall be in writing.

*Third Step*

If not settled in the second step, then the grievance committee, composed of not more than three (3) Union representatives, two (2) of whom shall be employes, shall meet